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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

JACK DUNCAN and JEAN DUNCAN,

Appellants,

v.

SABERHAGEN HOLDINGS, INC., ET AL.,

Respondents.

BRIEF OF APPELLANTS

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ASSIGNMENT OF ERROR

Respondents Unocal Corporation, Collier Chemical Corporation, and ConocoPhillips Company moved for summary judgment before Pierce County Judge Beverly Grant based on Alaska's two year statute of limitations for bringing personal injury claims.¹ Respondents sought to bar plaintiff Jack Duncan's claim arising from the rare form of cancer he contracted from asbestos exposure. In 2005, Mr. Duncan was diagnosed with malignant mesothelioma, an invariably fatal cancer of the pleural lining that surrounds the lungs (but which are not part of the lungs) and for which there is no cure. The only known occupational cause of mesothelioma is exposure to asbestos.

In their motion for summary judgment, Respondents argued that the claim was barred because Jack Duncan had been diagnosed with asbestosis in 1996 as part of a mass screening at a union hall. A lawyer (who has since been disbarred and criminally indicted for defrauding clients) filed a claim on Mr. Duncan's behalf without first consulting, or

¹ See Alaska Stat. § 09.10.070.

even informing him.² This action, filed in 1997, was against different defendants and regarded only asbestosis, which is a non-cancerous scarring of the parenchyma – the lung tissue itself. Unlike mesothelioma, asbestosis is not necessarily (or usually) fatal and often does not give rise to any symptoms. In contrast, mesothelioma is a cancer that grows in the thin membranes, called the pleura, which line the exterior of his lungs. Mesotheliomas are tumors caused when normal cells in the linings grow in a diffuse distribution, encasing the organ. The cancer is invariably fatal.

The expert testimony Duncan presented to Judge Grant was that (1) asbestosis and mesothelioma are entirely different diseases, (2) persons exposed to asbestos can have more than one asbestos related disease that are not necessarily discoverable at the same time, (3) any individual person can have mesothelioma without having asbestosis and vice-versa, (4) asbestosis is not directly related to mesothelioma since asbestosis is a scarring condition and not a cancerous condition, (5) mesothelioma was not a continued expression of asbestosis because it is a condition arising in

² Judge Grant was presented with evidence that Mr. Duncan's 1997 lawsuit was filed by a Florida lawyer named Louis Robles. Louis Robles has since been disbarred by the state of Florida and is now under federal indictment for fraud and misuse of client funds. *See Appendix 1 Lawyer Charged With Defrauding Asbestos Clients*, Associated Press, St. Petersburg Times Online, May 24, 2006; *Miami Attorney Indicted For Misappropriating At Least \$13.5 Million In Client Settlement Money*; News Release U.S. Department of Justice – US Attorney for the Southern District of Florida, May 23, 2006. Neither of these documents were in the record below as Mr. Robles had not yet been indicted at the time of the hearing, though he had been disbarred. Petitioners move to supplement the record with these articles, pursuant to RAP 10.3(a)(7).

the pleura (lining) of the lung and not in the lung itself as is asbestosis, (6) that each and every exposure to asbestos is a potential substantial factor in causing mesothelioma, and (7) occupational exposure to asbestos as short as one day is sufficient to cause mesothelioma. CP 48. No defendant presented any medical evidence disputing any of the above facts.³

On March 30, 2006, Judge Grant decided that all of Duncan's asbestos-related claims accrued in 1997 when the Robles firm filed, on Duncan's behalf, a claim arising from asbestosis. Judge Grant decided that Mr. Duncan's diagnosis with mesothelioma in 2005 did not give rise to a separate cause of action and that the action was therefore barred under Alaska law. Specifically Judge Grant ruled that:

1. Plaintiffs knew or should have known that Jack Duncan suffered some injury related to his asbestos exposure at the time they filed the 1997 Alaska federal court lawsuit.
2. Plaintiffs filed their current lawsuit in 2005 more than two years after the 1997 Alaska federal court lawsuit.

³ Plaintiffs presented two detailed expert affidavits from Dr. Samuel Hammar, one of the leading scholars regarding the pathology of asbestos related diseases, as well as Dr. Drew Brodtkin, an expert in occupational medicine and professor at the University of Washington. Their full declarations are located at CP 647-659 and 664-670.

Judge Grant concluded that Mr. Duncan's mesothelioma claim was barred under the Alaska statute of limitations and dismissed Mr. Duncan's case. CP 1112-1113.⁴ Appellants contend that this ruling was in error.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether, like Washington,⁵ Alaska law recognizes the discovery rule for occupational disease causes of action.
2. Whether Duncan's mesothelioma claim was timely filed in 2005 because he could not have known in 1997 that he would develop mesothelioma, a completely different occupational disease caused by exposure to asbestos.
3. Whether the trial court erred in failing to apply properly the Alaska discovery rule.

STANDARD OF REVIEW

A grant of summary judgment is a conclusion of law reviewed *de novo*. The appellate court conducts the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the non-moving party. *See, e.g., Green v. A.P.C. et al.*, 136 Wn.2d 87,

⁴ Judge Grant did not reach the issue of whether the Alaska statute of repose applied to bar the claim. Respondents argued this as an alternative theory for summary judgment. Appellants disputed the application of this statute primarily under the gross negligence exception. However, the application of the Alaska statute of repose is not before this Court on appeal because it was not reached by the trial judge. CP 1113.

⁵ *See Niven v. E.J. Bartells Co., et al.*, 97 Wn. App. 507, 983 P.2d 1193 (Div. I 1999), *review denied*, 141 Wn.2d 1016 (2000).

94, 960 P.2d 912 (1998). Alaska law is the same. *See, e.g. Mine Safety Appliances v. Stiles*, 756 P.2d 288, 291 (Alaska 1988).

STATEMENT OF THE CASE

1. Procedural Background

Jack Duncan is currently alive, but is dying. In April, 2005 he was diagnosed, for the first time, with malignant pleural mesothelioma, a terminal cancer that was caused by asbestos exposure. Most mesothelioma victims die within six to eighteen months of their diagnosis. CP 33-34.⁶ Plaintiff alleges that Mr. Duncan sustained this exposure, in part, at facilities owned or operated by defendants Unocal Corporation, Collier Chemical Corporation and ConocoPhillips.

On September 9, 2005 Mr. Duncan filed a personal injury lawsuit in Pierce County Superior Court against these and other defendants. CP 5-8. Based on his terminal condition Judge Grant ordered an expedited trial setting of April 28, 2006. CP 68-69.

Over the course of his deposition in January and February 2006, Mr. Duncan provided extensive testimony relating to exposure to asbestos while working as a pipefitting contractor in the 1960s and 1970s at Alaska energy producing facilities owned and/or operated by Respondents or their

⁶ Dr. Hammar also submitted an expert affidavit in support of a motion for expedited deposition and trial setting in which he stated that “while there are exceptions, most mesothelioma victims die within six to eighteen months of their diagnosis.”

predecessors during the 1960s and 1970s. He repeatedly testified that these companies provided no health or safety warnings to their outside contractors or safety equipment to protect workers from asbestos dust. *See e.g.* CP 496-499 (discussing Mr. Duncan’s exposure in 1968-69 at the Phillips Liquid Natural Gas Plant in Kenai Alaska); CP 506-508 (discussing Mr. Duncan’s work on a Union Oil (predecessor to Unocal) oil platform in the mid 1960s); CP 508-514 (discussing Mr. Duncan’s exposure at Collier Chemical in the late 1960s).⁷

In their motion below, respondents did not challenge the factual basis for Mr. Duncan’s claim that he had been exposed to asbestos during work at these facilities. Instead, Respondents Unocal, Collier Chemical and ConocoPhillips brought summary judgment motions seeking dismissal on two discrete grounds, arguing that under “settled” Alaska law: (1) Jack Duncan’s claims were time barred because he was diagnosed with asbestosis in the late 1990s and, in 1997, had filed a lawsuit for damages incurred because of asbestosis;⁸ and (2) under the Alaska statute of repose,

⁷ These are just examples of the nature of the testimony that was in the record before Judge Grant. There was examination throughout Mr. Duncan’s two day deposition on these sites at other times.

⁸ Respondent JT Thorpe & Son filed a joinder on this part of the summary judgment.

Alaska Stat. § 09.10.055, the claims were also time barred.⁹ Because Judge Grant dismissed the case based on the statute of limitations, she expressly held that she did not reach issues regarding the statute of repose. CP 1113.

2. *Jack Duncan's Background*

Jack Duncan is a 77 year old retired pipefitter and commercial fisherman. He lives with his wife of 53 years, Jean, in Kenai, Alaska in the same house he personally built after homesteading on this land before Alaska was a state. He and Jean are parents of three and grandparents of seven grandchildren. CP 484-485.

After serving in the U.S. Navy, he moved to Alaska around 1949 when it was still a "frontier" town. CP 484. In the early 1950s, Mr. Duncan began to make his living as a pipefitter working out of the plumbing and pipefitters union, Anchorage Local 367. CP 487. He worked as a commercial fisherman in the summer, but once the fishing season was over, he had to turn to other trades to make a living and thus continued his work in the pipefitting trades. CP 487.

3. *Prior Asbestos Lawsuit*

⁹ On the statute of repose issue, Duncan put forward significant evidence demonstrating that defendants were grossly negligent, thereby triggering an exception to the statute of repose and rendering it inapplicable in this case. CP 458-476; CP 671-871. However, as mentioned above, the trial court did not reach this issue.

In 1996, Mr. Duncan received a letter from what he thought was his union advising him that they were conducting a “lung screening test” in Anchorage. CP 517-518. Mr. Duncan was taken to a “huge semi trailer with an X-ray machine in it.” He received a chest x-ray and left. Three or four weeks later he received a letter from a doctor (whom he doesn’t know the name of) presumably associated with the Robles firm advising him that he had asbestosis. *Id.* To this day, Mr. Duncan has never met any attorneys from the Robles firm. *Id.* No one from the Robles firm ever contacted him to investigate his work history, the locations where he worked, or for which companies he had worked during his pipefitting career. CP 519.¹⁰

Indeed, Mr. Duncan never even knew which companies Robles sued on his behalf, nor was he asked the names of the companies that should be named. *Id.* Because he never met with any attorneys from the Robles firm, Mr. Duncan did not have an opportunity to discuss his alleged diagnosis of asbestosis during this period nor his case. *Id.* He never met the physician who purportedly “diagnosed” his asbestosis and

¹⁰ The testimony that Mr. Duncan offered related to this mass screening is similar to that described in recent judicial decisions calling into question the reliability of the “diagnoses” rendered in these screenings. *See e.g. In Re Silica Products Litigation*, 398 F.Supp.2d 563, 597 (S.D.Tex. at 2005). For a good description of the controversy surrounding these mass screenings, *see* Andrew Schneider, *Asbestos Lawsuits Anger Critics*, *St. Louis Post Dispatch* and *STLtoday.com*, February 11, 2003. It should be noted that Mr. Duncan’s current counsel does not participate in mass screenings and primarily represents individuals diagnosed by their physicians with either mesothelioma or asbestos related lung cancer.

certainly never had a doctor/patient relationship with this person. CP 518. Mr. Duncan received approximately \$2000 in compensation from this 1997 case.¹¹ He testified that he had since learned that Mr. Robles “went south” with client funds and has been disbarred. CP 518. And, as discussed above, Mr. Robles is now under federal indictment. *See* Fn. 2.

4. *Absence of Definitive Diagnosis*

For the past decade, Mr. Duncan has received regular medical checkups at Virginia Mason hospital in Seattle. After his encounter with the Robles firm, Mr. Duncan informed his doctors at Virginia Mason that he was concerned about the purported abnormal x-ray. Subsequently, there appears to be some dispute among his physicians in Seattle regarding whether or not Mr. Duncan actually even had asbestosis. Mr. Duncan suffered no symptoms associated with asbestosis through at least 2002. Medical records from the late 1990s indicate that certain of his physicians listed an “impression” of asbestosis. Other records as late as October 11, 2002 indicate a contrary diagnosis. On that day, Dr. Steven Kirtland charted the following impression:

¹¹ It should be noted that since none of the Respondents were sued in the 1997 case, there is no issue as to whether they had been previously released from suit by Mr. Duncan through a prior settlement agreement. Respondents sought dismissal on the grounds that Mr. Duncan sued other companies for his asbestosis and that therefore he was on notice that he should have brought his asbestos claim against them at that time even though he sued for asbestosis and not cancer in 1997.

History of asbestos exposure with restrictive lung pathology. *No evidence of interstitial lung disease suggesting an asbestosis.*

CP 644 (emphasis supplied). Dr. Kirtland made virtually the same clinical notation on October 25, 2001. He advised in that note that since Mr. Duncan is “asymptomatic, I don’t think we need to work that up any further.” CP 645.

No defendant produced any declaration from any physician indicating that they advised Mr. Duncan that he actually had asbestosis in the late 1990s. In point of fact, medical records into late 2002, indicate that perhaps he did not have asbestosis. These medical records also raise the inescapable inference from the notes of Mr. Duncan’s own treating physician that Duncan was, in essence, asymptomatic for asbestosis as late as 2002 – five to six years after he was allegedly “diagnosed” with asbestosis by the Robles provided screening doctor whom Mr. Duncan to this day has never met and with whom Mr. Duncan did not have any doctor-patient relationship.¹²

¹² Duncan’s expert, Dr. Andrew Brodtkin offers some illumination on the confusion about whether Mr. Duncan was or was not actually diagnosed with asbestosis in 1997 and the contrasting medical records from 2002 indicating “no asbestosis.” He opines that “at times, even well qualified and experienced physicians may reach different, but supportable conclusions about whether the results of the different tests and procedures warrant the diagnosis of asbestosis. In my experience, patients can be and at times are confused about whether or not they have asbestosis depending on what they have been told by different physicians, some of whom may not have familiarity with asbestos related diseases.” CP 670.

5. *Jack Duncan Is Diagnosed With Terminal Mesothelioma In April 2005*

In April 2005, Mr. Duncan was diagnosed with malignant mesothelioma by his physicians at Seattle's Virginia Mason hospital. His doctors advised him that there was a "very slim chance that [he'd] survive," but that they hoped that certain chemotherapy could "hold it[the cancer] where it was." CP 489. His pulmonologist advised him that the cause of this cancer of the lining of the lung was asbestos exposure.

April 2005 was the first and only time that Mr. Duncan was diagnosed with cancer in the pleura surrounding his lungs that was caused by asbestos exposure. At the time of the diagnosis, Mr. Duncan was advised by his doctors that the mesothelioma developed from an entirely different disease process from asbestosis. CP 519. Irrespective of whether Mr. Duncan actually had asbestosis in 1997, the Respondents in their motion below did not produce any evidence that Mr. Duncan was diagnosed with mesothelioma before April 2005. This fact is undisputed in this record.

6. *Asbestosis and Mesothelioma are Distinct Diseases Constituting Separate Injuries*

In response to the summary judgment motion, Appellant submitted the declaration of Dr. Samuel Hammar. Dr. Hammar is one of the leading experts on the pathology of asbestos related diseases. As his CV details,

he is a licensed Washington state physician, board certified in anatomical and clinical pathology. He is the co-editor of a textbook entitled *Pulmonary Pathology Tumors* and is a member of the US-Canadian Mesothelioma Panel that reviews cases of suspected mesothelioma for other pathologists and other physicians. He is a co-author of a book titled *Asbestos: Risk Assessment, Epidemiology and Health Effects*. Chapter 5 of that book is titled “The pathologic features of asbestos induced disease.” Dr. Hammar has diagnosed and/or reviewed cases of asbestos induced disease in several thousand patients. CP 647, 651-659.

Dr. Hammar testified by declaration to the following:

- Asbestos is an inorganic fibrous hydrated silicate mineral that causes cancerous and non-cancerous diseases, the primary cancers being lung cancer and mesothelioma.
- Non-cancerous diseases caused by asbestos include asbestos induced pleural effusions/acute asbestos-induced pleuritis; hyaline pleural plaques... and asbestosis.
- By definition, asbestosis is scarring of the lung parenchyma caused by asbestos. The exact mechanism that causes the scarring is not entirely known but involves various inflammatory cell and mediators of inflammatory cells.
- In contrast to asbestosis, mesothelioma is a type of cancer that arises from the cells that form the lining of the body cavities; namely the pleura, peritoneum and pericardium. These are thin membranes .2 to .4 millimeters thick.
- Mesotheliomas are tumors that are derived from normal cells in the linings that grow in a diffuse distribution and encase organs such as the lung intestine and sometimes, the heart.

CP 647-648. Dr. Hammar further testified that:

Asbestosis and mesothelioma are entirely different diseases. A report published by Dodson et. al., of which I am a co-author, found that only 3 of 55 patients with mesothelioma had clinical asbestosis, although 29 of 55 had pathologic asbestosis, usually mild asbestosis referred to as grade 1-2 asbestosis according to CAP-NIOSH criteria. Persons exposed to asbestos can have one or more asbestos related diseases. In fact, the majority of patients who develop mesotheliomas have plaques, although the plaques are not in any way directly related to mesothelioma *nor is asbestosis directly related to mesothelioma, since asbestosis is a scarring condition and not a cancerous condition.*

CP 648 (emphasis added).

Dr. Hammar concluded his declaration with the following:

I have reviewed the case of Jack Duncan and concluded Mr. Duncan had a left pleural epithelial mesothelioma. According to radiology reports in the clinical record, Mr. Duncan had calcified pleural plaques and minimal interstitial changes consistent with early (mild) asbestosis. Based on Mr. Duncan's history of occupational exposure, radiographic evidence of pleural plaques and mild asbestos, I concluded his left pleural epithelial mesothelioma was caused by asbestos. The only association between asbestosis and mesothelioma in Mr. Duncan's case was that both diseases were caused by asbestos. They are independent diseases and one is not directly related to the other. Any individual person could have mesothelioma without having asbestosis and vice-versa.

CP 648.

Appellant also submitted two expert declarations from Dr. Andrew Brodtkin, a clinical professor of occupational medicine at the University of Washington. Dr. Brodtkin personally examined Jack Duncan and also concluded that Mr. Duncan is suffering from pleural malignant mesothelioma, a terminal cancer. On the question of the relationship between asbestosis and mesothelioma in this case, Dr. Brodtkin is in complete agreement with Dr. Hammar. He concludes:

Pleural mesothelioma does not arise from pre-existing non malignant pleural thickening or plaques, and is an entirely separate and distinct disease entity from non-malignant asbestos related pleural changes. It is also entirely distinct from asbestosis (parenchymal scarring).....

Mesothelioma does not progress from either asbestosis or from pleural thickening ...Mesothelioma causes injury by a completely different mechanism [than asbestosis], with malignant transformation of pleural cells into cancer cells which invade normal tissue, encasing the lungs and vital organs. These separate injuries frequently occur at different times; they are usually diagnosable at different times, even if the same patient eventually ends up with both conditions.

The diagnosis of asbestosis depends upon findings consistent with the scarring of the lung parenchyma ... in contrast, the diagnosis of mesothelioma also requires a diagnostic *pathologic* examination of diseased tissue or cells.

CP 664-670 at ¶ 8; 14, 21 (emphasis supplied). There is no evidence that Mr. Duncan had a biopsy of his lung tissue at any time before 2005 from

which it could have been discovered, pathologically, that he was suffering from malignant mesothelioma.

Respondents do not attempt to dispute this medical evidence. All appear to agree that, in 1996 and for several years thereafter, Jack Duncan did not know and could not have known that he would develop terminal mesothelioma in 2005.

Nonetheless, Judge Grant held that, under Alaska law,¹³ Duncan's mesothelioma suit is time-barred because it was not filed within two years of learning he had asbestosis.

SUMMARY OF ARGUMENT

This case addresses the question of when a cause of action accrues in cases involving multiple diseases brought on by the same toxic agent. Washington law recognizes the fundamental unfairness of denying people like Mr. Duncan a reasonable opportunity to pursue a claim for damages arising from mesothelioma on the basis that the statute of limitations began to run when he was diagnosed with asbestosis.¹⁴ Judge Grant erred in holding that Alaska law is blind to this unfairness.

The discovery rule, as adopted in both Alaska and Washington, mitigates the harshness of the statute of limitations that may bar otherwise

¹³ The parties agree Alaska law applies.

¹⁴ See *Niven*, 97 Wn. App. at 517-518.

meritorious claims. Under the discovery rule, as applied in both states, the statute of limitation begins to run at the time the plaintiff knew or should have known all the essential elements of the cause of action.¹⁵ There is no material difference between Alaska law and Washington law on this question. The cases relied upon by the respondents below, *Smith v. Thompson*, 923 P.2d 101 (Alaska 1996) and *Sopko v. Schlumberger*, 21 P.3d 1265 (Alaska 2001), would have been decided in the exact same way had they been decided under Washington law.

The trial court nonetheless held that, based on *Smith* and *Sopko*, Alaska law reaches an opposite conclusion from the one Washington law would compel in this case.¹⁶ This conclusion was erroneous. Like Washington, the Statute of Limitations in Alaska begins to run when Mr. Duncan knew or had reason to know of the injury for which he sued in 2005: mesothelioma. Alaska is no more blind to the scientific facts pertaining to asbestos related diseases than Washington. Because Mr. Duncan could not have known that he had or would likely develop mesothelioma until he was diagnosed in 2005, this action is not time-barred under Alaska law.

¹⁵ See, e.g., *Pedersen v. Zielski*, 822 P.2d 822, 906 (Alaska 1991); *White v. Johns-Manville Corp., et. al.*, 103 Wn.2d 344, 693 P.2d 687 (1985).

¹⁶ There can be no dispute that, under Washington law, Duncan filed his complaint alleging asbestos-induced mesothelioma before the statute of limitations ran. See *Niven*, 97 Wn. App. at 514, discussed, *infra*, § B(1).

ARGUMENT

A. Alaska's Discovery Rule Is Predicated On Principles Of Fundamental Fairness

Under the traditional “damages rule,” a cause of action accrues at the time of injury. *See Sopko v. Schlumberger*, 21 P.3d 1265 (Alaska 2001); *Mine Safety Appliances Appliances Co. v. Stiles*, 756 P.2d 288 (Alaska 1988). The statute of limitations for personal injury requires such a suit be filed within two years of accrual. AS 09.10.070. This rule for construction of the statute of limitations can have the harsh result of barring an otherwise meritorious claim when the plaintiff was unaware within the limitation period of an element of the cause of action, such as the cause or existence of an injury. *Cameron v. State of Alaska*, 822 P.2d 1362, 1365 (Alaska 1991); *Pedersen v. Zielski et. al.*, 822 P.2d 903, 906 (Alaska 1991). Alaska courts apply the discovery rule “under which the statute does not begin to run until the claimant discovers or reasonably should have discovered, the existence of the elements essential to his cause of action.” *Pedersen*, 822 P.2d at 906, citing *Mine Safety Co.* 756 P.2d at 291.

The origins of the Alaska discovery rule are important to understanding how this judicially made rule developed over the 25 years since its adoption. Alaska first adopted the discovery rule in 1982 in the

legal malpractice context. *Greater Area Inc. v. Bookman*, 657 P.2d 828, 829-30 (Alaska 1982). Relying principally on the California case of *Neel v. Magana et. al.* 6 Cal.3d 176, 491 P.2d 421, 98 Cal.Rptr 837 (Cal. 1971), the Alaska Supreme Court held:

The statute of limitations for legal malpractice does not begin to run until the client discovers, or reasonably should discover, the existence of all the elements of his cause of action.

Bookman, 657 P.2d at 829-30. As early as 1975, Washington Courts also relied on *Neel v. Magana et. al.* to invoke the discovery rule. See *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 543 P.2d 338 (1975) (“Against the assumptions that stale claims are more likely to be spurious and more likely to be supported by untrustworthy evidence, we must balance the unfairness of cutting off valid claims if, under the circumstances, the plaintiff would probably not know he had been injured until after the limitations period had run”).

In 1984, the Alaska Supreme Court first applied the discovery rule outside the professional liability context in the context of an action predicated upon negligence and product liability. *Hanebuth v. Bell Helicopter International*, 694 P.2d 143 (Alaska 1984).

In *Hanebuth*, a helicopter manufactured by the defendant crashed in a remote area of Alaska in 1974. The Plaintiff’s decedent died in the

crash but the wreckage was not discovered until 1982. Investigation revealed that the accident may have occurred as a result of a mechanical defect in the helicopter. *Hanebuth* 694 P.2d at 143.

Bell Helicopter removed the case to federal court and sought to dismiss it pursuant to the two year statute of limitations of the Alaska wrongful death act, Alaska Stat. § 09.55.580. The US District Court for Alaska believed the issue to be one of first impression under the Alaska case law and therefore certified the question to the Alaska Supreme Court by asking the following question. “Does the reasonable failure of plaintiff to discover an element essential to her cause of action toll the running of the two year period by AS 09.55.580 within which to commence an action for wrongful death?” *Id.* at 144.

The Alaska Supreme Court decided the issue in two parts first holding that the discovery rule applied outside the professional malpractice area addressed in *Bookman*. In so holding, the Alaska Court emphasized the equitable nature of the discovery rule as adopted in Alaska and other jurisdictions at the time:

it is the nature of the problems faced by the plaintiff in discovering his injury and its cause, and not the occupation of the defendant, that governs the applicability of this discovery rule.

Hanebuth, 694 P.2d at 144, quoting *Stoleson v. United States*, 629 F.2d 1265, 1269 (7th Cir. 1980). Thus, regardless of the nature of the legal action, the Alaska discovery rule applies when the injury or its cause is not apparent at the time of the negligent act. *See also, Pedersen*, 822 P.2d at 906-07. *See also John's Heating Serv. v. Lamb*, 46 P.3d 1024, 1031 (Alaska 2002) (*Lamb I*).

The *Hanebuth* Court moved to the second part of its analysis by creating a new rule of law applying the discovery rule to the wrongful death statute. The Court eloquently emphasized that the discovery rule was founded on considerations of fundamental fairness. The discovery rule had to apply to AS 09.55.580 due to the remedial nature of wrongful death statutes and because the Alaska legislature did not intend for the statute to lead to unjust and absurd results. *Id.* at 144. It concluded its opinion in the following way:

We hold that the discovery rule does apply to the death act because of the fundamental fairness of the rule and ... because it is consistent with the purposes of the act. The legislature did not intend that the limitation period in the death act be interpreted to reach unjust and absurd results. The same reasoning, founded on basic justice, that has led us to adopt the discovery rule generally is present in wrongful death actions. It is profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has had a reasonable opportunity to do so.

Id. at 146-147.

This ideal of fundamental fairness has guided the Alaska Supreme Court in refining its discovery rule in decisions since *Hanebuth*. The question to be addressed in this case is whether the same fundamental fairness should apply in the case where the plaintiff could not reasonably have discovered that he had cancer within the statutory period.

B. Alaska Decisions On Inquiry Notice Turn On The Diligence Of The Plaintiff In Discovering The Elements Of His Cause Of Action

In *Mine Safety Appliances v. Stiles*, 756 P.2d 288 (1988) the Alaska Supreme Court first addressed what constitutes inquiry notice under the discovery rule. In 1978, Mr. Stiles was seriously injured while working on an Alaska drilling platform. He was struck on the head by a metal object and subsequently suffered mental illness and institutionalization from the head injuries. Stiles sued the manufacturer of the helmet he was wearing at the time of the accident (Mine Safety Appliances) but did not do so until four years after the accident. *Mine Safety*, 756 P.2d at 289-90. Mine Safety moved for summary judgment under AS 09.10.070, Alaska's two year statute of limitations. The *Mine Safety* Court defined the relevant inquiry under *Hanebuth* and its progeny as when the claimant reasonably should have known of the facts supporting his cause of action. *Id.* at 291. The court stated the rule as follows:

We look to the date when a reasonable person has enough information to alert that person that he or she has a potential cause of action or should begin an inquiry to protect his or her rights.

Id. The Court also held that “ordinarily summary judgment is inappropriate on the issue of what date the statute should start running. However, if there are uncontroverted facts that determine when Stiles reasonably should have begun an inquiry to protect his rights” the issue can be decided as a matter of law. *Id.*

The Court held that on the day of the accident, Stiles had “notice of facts sufficient to prompt a person of average prudence to inquire.” *Id.* at 292. Stiles, the Court held, simply did not exercise due diligence to discover the facts. *Id.* at 293.

In reaching this conclusion the *Mine Safety* court expressly distinguished cases involving traumatic injuries from those involving latent injuries stemming from toxic exposures. The court specifically discussed asbestos caused diseases “which take years to develop, thereby making it difficult to discern a causal link between the product and injury.” *Mine Safety*, 756 P.2d at 292 (n.4). Indeed, in distinguishing latent injuries from traumatic injuries *Mine Safety* cited one of the key Washington authorities applying the discovery rule in an asbestos context. *Id.* at n. 4 citing *White v. Johns Manville Corp.*, 103 Wash.2d 344, 693

P.2d 687, 694 (Wash.1985).¹⁷ Alaska has historically looked to Washington for insight and guidance to develop its statute of limitations jurisprudence. See *Beasley v. Van Doren*, 873 P.2d 1280 (Alaska 1994) (following Washington's rule as stated in *Richardson v. Denend*, 59 Wn. App. 92, 97 n.7, 795 P.2d 1192 (Div II. 1990), *review denied*, 116 Wn.2d 1005 (1991)); *Hanebuth*, 694 p.2d at 144 n.5, citing *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 543 P.2d 338 (1975); *Sharrow v. Archer*, 658 P.2d 1331, 1333 (Alaska 1983) (citing *Ohler v. Tacoma General Hospital*,

¹⁷ In *White*, the plaintiff filed a wrongful death and survivorship action in 1980 arising out of her husband's death from mesothelioma in 1974. Although the action was clearly filed outside the three-year statutory period, the personal representative claimed that she did not learn until 1978 that her husband's mesothelioma may have been due to asbestos exposure. *Id.* at 345. The defendants argued that a wrongful death action automatically accrues at the time of the decedent's death. The Supreme Court rejected this contention. The Court explained:

We reject defendant's assertion that, as a matter of law, the date of the decedent's death marks the time at which a wrongful death action "accrues." Instead, we hold a wrongful death action accrues at the time the decedent's personal representative discovered, or should have discovered, the cause of action. Whether death marks the time at which the cause of action could have been prosecuted is a question of fact.

Id. at 352-53. The Supreme Court went on to hold that the plaintiff's survivorship claim was also subject to the Discovery Rule, and that the Statute of Limitations did not commence to run unless the decedent had actual or imputed knowledge of his cause of action prior to death. *Id.* at 358. The Court explained:

[W]hile the plaintiff in the present case may have been injured by defendant during his life, his cause of action did not accrue unless he discovered or should have discovered, the causes of his injuries. Since the decedent would have benefited from the Discovery Rule had he not died, his representative should likewise benefit from it: what survives to the personal representatives are not only the decedent's ripe cause of action but include their potential causes of action which may not have accrued at the time of death.

Id. at 359.

92 Wn.2d 507, 598 P.2d 1358 (1979), among majority of jurisdictions adopting discovery rule).¹⁸ See also, *Cameron v. State of Alaska et. al.*, 822 P.2d 1362, 1365-66, citing *Virgil v. Spokane County*, 42 Wn. App. 796, 714 P.2d 692 (Div III. 1986) (reversing statute of limitation dismissal because of genuine issue of material fact on discovery rule).

In 1991, the Alaska Supreme Court adjusted the *Mine Safety* rule because it contained “a seed which [could] produce unjust results.”

Cameron, 822 P.2d at 1366. That is:

Reasonable inquiry, once triggered by inquiry notice, may not produce knowledge of the elements of a cause of action within the statutory period, or it may produce knowledge of the elements of the cause of action only relatively late in the statutory period. Either way it is possible that a litigant may be deprived of his right to bring a lawsuit before he has had a reasonable opportunity to do so.

¹⁸ In *Ohler*, plaintiff was blinded by excessive concentrations of oxygen in an incubator as an infant. *Ohler*, 92 Wash.2d at 509. Plaintiff brought claims against the hospital and the incubator manufacturer when she was 22 years old. The plaintiff acknowledged that she knew from an early age that her blindness was caused by excess oxygen, but did not discover that this might be attributable to the negligence of the hospital or the unreasonably dangerous condition of the incubator until after her 21st birthday. *Id.* In deposition, she testified that she may have even been told about her condition and its cause nearly four years prior to filing suit. *Id.* at 512. The trial court dismissed based on the Statute of Limitations. The Washington Supreme Court reversed, holding that plaintiffs’ medical negligence claim did not accrue until she discovered all the elements of her cause of action: duty, breach, causation and damages. *Id.* at 511. The Court went on to state that knowledge of the elements of a possible claim “could not be constructively imputed” to Lana, even though her parents might have known the elements of the claim at an earlier point in time. *Id.* at 512. The Court also noted that “the record here does not demonstrate manifestly that RLF and its possible wrongful causes were ever fully explained to Lana...” *Id.*

Id. at 1366. To correct this injustice, the limitation period may be tolled until a reasonable person discovers, or would again be prompted to inquire into, the cause of action, if initial reasonable inquiry does not reveal the elements of a cause of action in time. *Id.* at 1367.

On the whole, the discovery rule in Alaska restricts plaintiffs who were on inquiry notice but failed to act in a timely manner, while at the same time preserving causes of action for diligent plaintiffs who had no notice of a cause of action. *See Pedersen*, 822 P.2d 903 (finding a genuine issue of material fact as to reasonableness of plaintiff's unproductive inquiry as to cause of injury); *John's Heating Service v. Lamb*, 129 P.2d 919 (Alaska 2006) (*Lamb II*) (affirming denial of statute of limitation's defense because plaintiffs did not know and were not on notice of impairment's cause). In *Pederson*, the Alaska Supreme Court stated the rule concisely:

Although the need for the discovery rule is most clear in cases where the plaintiff's injury is undiscovered and reasonably undiscoverable within two years after it was caused, it also applies to cases where the injury was known but its cause was unknown and reasonable diligence would not lead to its discovery [citing *Hanebuth*, 694 P.2d at 143].

Pederson, 822 P.2d at 907.

Here, Mr. Duncan's mesothelioma was not only an unknown injury in 1997, no amount of diligence would have led to its discovery at

the time or for several years thereafter. Even assuming the 1996 diagnosis was bona fide, the evidence before Judge Grant was that Mr. Duncan's mesothelioma was distinct pathologically and diagnostically from his 1996 diagnosis of asbestosis and arose in a different organ. Mesothelioma did not present in 1996-97; Mr. Duncan did not undergo a biopsy that would have alerted him to the possibility that he would develop cancer. Nor was he instructed to. In no way was Mr. Duncan on inquiry notice because the injury for which he sued in 2005 was "undiscovered and reasonably undiscoverable." *Pederson*, 822 P.2d at 907. The asbestosis injury for which he sued in 1996-97 was distinct pathologically and clinically from mesothelioma according to the undisputed evidence in the case. CP 647-648.

Respondents will ask this Court for a rule of Alaska law that holds that *any* asbestos related injury of *any* type is sufficient to put a Plaintiff on inquiry notice to trigger the running of the statute of limitations. They argue that Duncan was generally aware that he had been harmed by asbestos and that that is sufficient to trigger the statute.

However, the objective medical fact this argument ignores is that Jack Duncan could not have sued based on mesothelioma in 1997 because he did not have it. Moreover, the overwhelming likelihood was that he would never get it. CP 668. Had he attempted in 1997 to sue these

defendants for damages relating to his potential for developing mesothelioma, his claim would not have been sustainable. Respondents would have argued that Duncan could not seek damages for mental anguish for fear of cancer, or for an increased likelihood of developing cancer. Indeed, appellants are aware of no Alaska authority that permits a Plaintiff to seek damages for mental anguish relating to fear of cancer on the grounds that such a fear is objectively reasonable. Even if Alaska had such a rule, the undisputed evidence in the record before Judge Grant was that such a fear would not have been reasonable in 1997 because, according to Dr. Brodtkin:

It cannot be said, to a reasonable degree of medical probability that a majority of persons with pleural thickening or asbestosis will also develop pleural mesothelioma, and in fact the large majority of such individuals do not.

CP 668 at ¶ 15.¹⁹

The Kentucky Supreme Court unanimously pinpointed this distinction in *Carroll v. Owens Corning Fiberglas et. al.*, 37 SW 3d 699 (Kentucky 2000):

This case does not turn so much on the rule against splitting causes of action, but more on pinpointing when a cause of action accrues in cases involving multiple diseases brought on by the same toxic agent.

¹⁹ See also, *Sherbahn v. Kerkove*, 987 P.2d 195, 198-199 (Alaska 1999) (disallowing recovery for future medical expenses absent objective evidence that plaintiff would more likely than not contract the illness requiring those expenses);

Since the discovery of its toxicity, asbestos has been found to be the cause of several impairments, mostly respiratory. Some, such as pleural plaques and thickening, are not debilitating. Others are potentially fatal, such as lung cancer and the rarer mesothelioma. Asbestosis can cause impairment, or as is obvious from [Plaintiff's] failure to bring suit after diagnosis, it can be a milder disease. What is important to note is that these diseases are not causes or prerequisites for each other. One does not flow from the other. [citing] David E. Lilienfeld, "The Silence: The Asbestos Industry and Early Occupational Cancer Research: A Case Study," 81 *Am. J. Pub. Health* 791 (1991). When [the plaintiff] was diagnosed with asbestosis, he did not necessarily know, nor should he have known that he would also eventually develop lung cancer. Only actual knowledge or knowledge of the probability of disease triggers the statute of limitations ...

[Plaintiff's] knowledge of asbestosis did not make his lung cancer anymore knowable or give him a reason to expect it. Therefore, we hold that the action for cancer accrued on the date of the diagnosis of the cancer, not the diagnosis of asbestosis, which is a separate and distinct disease.

Carroll, 37 SW 3d at 700-701, 702.

Under the rule Respondents claim to currently exist in Alaska, a person injured by asbestos would be on inquiry notice at the first sign of any abnormality in their lung x-rays that could be related to asbestos exposure. Under this scenario, that individual would have to sue any possible responsible party for his asbestos injury within the statutory period no matter how minor or weak the medical case would be. If that person chose not to proceed with a lawsuit at that time because the injury

was so minimal so as to merit little or no compensation, that person would have no opportunity to seek redress if the he developed asbestos related cancer in a different organ ten years later. This is the paradox inherent in the trial court's decision to dismiss this case based upon Mr. Duncan's diagnosis of asbestosis and it is the quintessential "absurd and unjust" result that *Hanebuth* warns against.

C. Alaska Law Compels Reversal Of This Summary Judgment

In the arguments below, Respondents repeatedly asserted to Judge Grant that Alaska law was "settled" on the issue of whether a diagnosis of asbestosis precludes a plaintiff's ability to seek damages for mesothelioma first diagnosed eight years later. Appellants vigorously disputed the assertion that this was "settled" Alaska law. There is no case from an Alaska court discussing asbestosis and mesothelioma in a context remotely similar to the case at bar. There are no Alaska cases that address this second disease issue in any detail comparable to that discussed in *Niven* and *Carroll*. The critical cases that Respondents allege establish the rule barring Duncan's claims in this case are easily distinguished.

As the issue here mirrors those decided in *Niven*, a thorough explication of *Niven* is useful, though that decision is not controlling.

1. Washington's Discovery Rule, As Applied In *Niven v. E.J. Bartells*, Would Permit Duncan's Occupational Disease Case To Proceed

In *Niven v. E.J. Bartells*, 97 Wn. App 507 (1999), a retired insulator filed suit in 1980 based on a diagnosis of asbestosis. His case was resolved in 1986. *Id.* at 509. In 1993, the same plaintiff was diagnosed with lung cancer. He filed a second lawsuit against different defendants. *Id.* The trial court granted defendants summary judgment on the lung cancer complaint based on Washington's statute of limitations.

On appeal, the court noted:

According to competent medical testimony in the record ... the presence of asbestosis does not necessarily imply that lung cancer will develop in the same individual. Although there is an increased risk of contracting mesothelioma or lung cancer when an individual has asbestosis, the disease processes are completely different. In fact, asbestos-related lung cancer or mesothelioma can exist and develop without the presence of asbestosis.

[Plaintiff's] asbestosis and lung cancer resulted from different disease processes, even though they were both related to his occupational exposure to asbestos.

Niven, 97 Wn. App at 515-16.

Niven could not have recovered damages for lung cancer in his 1980 action as he could not have demonstrated with reasonable probability that he would get the disease. *Id.* at 514. Thus, under the trial court's holding, *Niven* could never be compensated for developing cancer. *Id.*

The Court of Appeals applied Washington's discovery rule and reversed. The court held that, under the inquiry notice provision of Washington's discovery rule, the only question the trial court should have considered was whether the plaintiff should have known of the presence of his lung cancer more than three years before he filed suit. *Id.* at 517. As there was no statement in the record from a health care professional showing that the plaintiff's lung cancer could have been diagnosed more than three years before he filed his lawsuit, the Court of Appeals reversed the grant of summary judgment. *Id.* at 518. The relevant facts in *Niven* are identical in Mr. Duncan's case.

2. Alaska Law Applies The Discovery Rule To The Circumstances Of Occupational Diseases And Latent Injuries

Alaska law is not contrary to *Niven*. The trial court ignored Alaska's expressed willingness to apply the discovery rule to occupational disease cases, because no "incident" exists in this context. The trial court's error was a misapplication of the general rule that a cause of action accrues at the time of the breach of duty or tortious conduct, regardless of whether the full extent of the damage is known. This non-controversial rule, very recently re-stated by the Alaska Supreme Court, is also a feature of current Washington law. *See, Brannon v. Continental Casualty Co.*, S-11505 (Alaska June 9, 2006), *See also, Steele v. Organon, Inc.*, 43 Wn.

App. 230, 716 P.2d 920 (Div. III), *review denied*, 106 Wn.2d 1008 (1986).

The trial court and respondents erroneously relied on two Alaska cases, *Smith v. Thompson*, 923 P.2d 101 (Alaska 1996) and *Sopko v. Schlumberger*, 21 P.3d 1265 (Alaska 2001) that stand simply for this general rule.²⁰ Neither case deals with occupational diseases, where the time of breach of duty or tortious conduct and injury is ill-defined. The Alaska court expressly limited its holdings in these two cases in such a way that makes them inapplicable here. Moreover, the two cases do not contradict *Niven*, and are entirely consistent with Washington law.

In *Smith v. Thompson*, the Alaska Court applied the general rule that accrual of a cause of action is not postponed until a plaintiff learns the full extent of damages caused by ordinary negligence. Smith was injured in a car accident with Thompson in late November 1987. *Smith*, 923 P.2d at 102. Her initial head and neck pain disappeared after a few days and she was symptom free for all of 1988. In early 1989, she broke her wrist resulting in a heavy cast she wore for almost two years. Shortly after breaking her wrist, she began experiencing headaches and shoulder pain. The pain, initially attributed to the cast, continued after the cast was removed in October 1990. In 1991, a chiropractor told Smith that the pain was caused by the car accident. After successive back surgeries, she

²⁰ See also *Wettanen v. Cowper*, 749 P.2d 362 (Alaska 1988).

brought suit against Thompson in 1992, over four years after the incident. Smith argued her case was not barred by the statute of limitations because the damages element of her cause of action was not reasonably discoverable until within two years of filing suit. *Id.* at 104-5.

The Alaska Court asked: “Does knowledge of some compensable injury resulting from a *sudden traumatic event* trigger the statute of limitations even if the full extent of damages is as yet unknown?” *Id.* at 106 (emphasis added). The court answered affirmatively, stating: “the discovery rule is not available in a case of *ordinary negligence* where a plaintiff merely misjudges the severity of a known injury.” *Id.* (emphasis added; citation omitted).

The outcome in *Smith v. Thompson* is consistent with the outcome in a case discussing this aspect of Washington’s discovery rule. *Steele v. Organon, Inc.*, 43 Wn. App. at 236. In *Steele*, the plaintiff, Steele experienced a loss of limb sensation and brief hospitalization after ingesting drugs in too large a dose. Eight years later, as a delayed effect over the overdose, Steele suffered a heart attack and stroke. *Id.* at 230-33. Like Smith in Alaska, Steele argued that the discovery rule applied because the damage element of her cause of action was missing until much

later.²¹ But the Washington court affirmed the dismissal of Steele's action on statute of limitations grounds. In so doing the court explicitly distinguished occupational diseases like asbestos-caused illnesses, noting that "occupational diseases arise out of a course of events, not out of a discrete act; it is the development and awareness of the disease, not some symptomatology, which is crucial." *Steele*, 43 Wn. App. at 236.

Smith, the Alaska case, and *Steele*, the Washington case, reach the same result. Both *Smith* and *Steele* arose out of a specific incident with immediate harm. *Niven*, in contrast, was an occupational disease case in which the injury was latent and developed over time. This difference is made plain in *Smith* by Justice Rabinowitz's precise language, and in *Steele*, by the explicit distinction of occupational disease facts.

It bears noting that *Niven*, decided 13 years after *Steele v. Organan*, expressly held that the *Steele* rule on inquiry notice was not applicable in the asbestos context. *Niven*, 97 Wn.App. at 515. It did so for the reason that "the stroke and heart attack suffered by the plaintiff in *Steele* resulted from the same disease process as her initial injuries. By contrast, Niven's asbestosis and lung cancer resulted from different disease processes, even though they were both related to [Niven's]

²¹ Compare *Smith*, 923 P.2d at 106 ("In this instance, the element which Smith argues was undiscovered for several years is damages."); with *Steele*, 43 Wn. App. at 233 ("Mrs. Steele argues the damage element of a cause of action against the defendants was missing until 1981, when she suffered the heart attack.")

occupational exposure to asbestosis.” *Id.*²² Nevertheless, it cannot be said that *Smith*, the Alaska case relied upon principally by the Respondents and the trial court, and *Steele* are anything but identical in rationale and outcome.

Both before and after the *Smith* case, the Alaska Court specifically recognized that occupational diseases must be treated differently from tortious incidents. In *Mine Safety v. Stiles*, 756 P.2d at 292, n.4 (discussed supra §A) the Alaska Court noted that the discovery rule has special application to occupational diseases, like those involving asbestos, because they take years to develop, the diseases are not obviously related to the occupational exposure, and determining the causal link requires massive research. *Id.* In *Mine Safety*, the court declined to apply these special considerations because a reasonable person should immediately suspect a causal connection between a broken helmet and head injuries in an accident. *Id.* Therefore, on the day of the accident, Stiles was on inquiry notice of possible deficiencies in the helmet. His failure to make such an inquiry until more than two years later barred his claim.

The Alaska Court again recognized the difference between occupational diseases and other torts in *Sopko v. Schlumberger*, on which

²² The similarity between this sentence and Dr. Hammar’s conclusion to his declaration is striking. CP 648.

respondents and the trial court erroneously relied. Sopko became severely sick in mid-September 1990 while cleaning up after a warehouse fire on the North Slope. By September 20, 1990, after a diagnosis of toxic fume exposure, he had sufficient information to prompt an inquiry into a cause of action. Sopko, like the plaintiffs in *Smith v. Thompson* and *Steele v. Organon*, experienced a particularized tortious incident with immediate injury. *Sopko* involved a single incident involving an acute inhalation of toxic fumes, not comparable to intermittent and cumulative asbestos exposure over a working lifetime.

As in *Mine Safety*, the Alaska Court refused to apply an occupational disease rule. In occupational disease cases, the court stated, “the plaintiff initially does not have any symptoms of injury, and therefore has insufficient information to prompt an inquiry into his cause of action.” *Sopko*, 21 P.3d at 1271. But Sopko had sufficient information to prompt an inquiry. He experienced a particularized tortious incident with immediate injury. But he made no inquiry whatsoever, instead, by his own admission, he “pretty much forgot about it.” *Id.*

The *Sopko* Court applied the inquiry notice aspect of the discovery rule to determine the accrual date. Under Alaska law, when a non-productive, but reasonable inquiry is made within the statutory period, the limitations period is tolled until a reasonable person discovers actual

knowledge of, or would again be prompted to inquire into, the cause of action. *Cameron*, 822 P.2d 1367. Because the plaintiff in *Sopko* showed no inquiry at all within two years of notice, the Alaska Court had no occasion to determine if an inquiry was reasonable under the circumstances. *See Cameron*, 822 P.2d at 1367, citing *Pedersen*, 822 P.2d at 908. It was compelled to hold *Sopko*'s claim was barred because he failed to make reasonable inquiries within two years after he had sufficient information to prompt an inquiry. *Sopko*, 21 P.3d at 1271. By contrast, Mr. Duncan addressed his concerns about asbestosis with his doctors at Virginia Mason on several occasions. But, despite this inquiry, he could not have known that he would be diagnosed with mesothelioma in 2005.

The different outcomes in *Sopko* and *Niven* are not the result of a difference in law between the states. Rather, the difference is in the application of the inquiry notice aspect of the discovery rule when comparing particularized tortious incidents with non-particularized occupational diseases and latent injuries stemming from intermittent and cumulative exposures to toxic substances. *Cf. Niven*, 97 Wn. App. at 517-18 (holding lung cancer claim not time-barred because an inquiry by plaintiff could not have discovered evidence of lung cancer within two years of asbestosis diagnosis).

In a recent case, published while the parties were briefing the motion to the trial court, the Alaska Supreme Court again analyzed the difference between particularized and latent injuries in the context of the discovery rule. In *John's Heating Service v. Lamb*, 129 P.2d 919 (2006), the Alaska Supreme Court reviewed the inquiry notice rule.²³ The Lamb suit alleged brain damage caused by long-term, low level exposure to carbon monoxide released by a faulty furnace. *Id.* at 920. The Lambs had a John's Heating Service agent visit their house in 1991, because they were concerned that their furnace was circulating soot throughout the house and about a persistent smell of fuel. *Id.* at 921. The agent did nothing to address the problem. The Lambs began to suffer physical problems, but continued to live in the home. In 1993, a different furnace repairman told them that the furnace was likely circulating carbon monoxide throughout the house, and that their health problems might be related. *Id.* The Lambs filed suit on December 23, 1993. The trial court rejected a statute of limitations summary judgment motion by defendant and a jury returned a verdict for the Lambs.

After the first *Lamb* appeal, the case was remanded for determination of when the Lambs were on inquiry notice because of

²³ *Lamb* was not the focus of inquiry by the Court or the parties at oral argument.

information sufficient to alert a reasonable person of a potential cause of action. *Lamb I*, 46 P.3d at 1033.

On remand, the trial court held the suit was timely and distinguished between notice about soot problems generally and notice about a potential cause of action for their medical symptoms. *Lamb II*, 129 P.3d at 925. The trial court stated: “this is not a case about a dirty house; it is about brain damage.” *Id.* The inquiry notice date for brain damage caused by carbon monoxide poisoning brought the suit’s filing within the statute of limitations. The Alaska Supreme Court endorsed this reasoning. *Id.* Notice of a cause of action for a sooty house did not mean notice of a cause of action for brain damage caused by a furnace circulating carbon monoxide in a house.

Duncan’s occupational disease case is similar to *Lamb*. Duncan was on notice after the asbestosis diagnosis that he had a cause of action for that specific occupational disease. But, under Alaska law, he would not have been able to recover damages for mesothelioma in that action because he could not have shown a reasonable probability that he would develop cancer. *See, e.g., Sherbahn v. Kerkove*, 987 P.2d 195, 198-199 (Alaska 1999) (disallowing recovery for future medical expenses absent objective evidence that plaintiff would more likely than not contract the illness requiring those expenses); *Blumenshine v. Baptiste*, 869 P.2d 470,

473 (Alaska 1994) (same); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 997 (1993) (to recover based on a fear of cancer plaintiff must show the knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that he will develop cancer in the future due to the toxic exposure). In the same way, the Lambs would not have been able to recover damages for brain damages because they had a cause of action for a sooty house.

Alaska law applies the discovery rule in the occupational disease context, and in the case of latent injuries stemming from intermittent and cumulative toxic exposures. Its existing jurisprudence does not bar relief in these contexts. What remains is to apply Alaska's discovery rule to the present facts.

D. The Alaska Discovery Rule Permits This Occupational Disease Case To Proceed

Respondents, in the motion below, tacitly acknowledged the unfairness in preventing Mr. Duncan from bringing this lawsuit, but rested their arguments on so-called settled law. The Alaska Supreme Court, however, has more than once held that the statute of limitations will not be applied to reach "an absurd and unjust result." *Cameron*, 822 P.2d at 1365, citing *Hanebuth*, 694 P.2d at 146. Barring Duncan's claim would be absurd, unjust and, as demonstrated above, not compelled by settled law.

Jack Duncan's mesothelioma is an occupational disease under the criteria set forth in *Mine Safety* for the following reasons:²⁴ Mesothelioma takes years to develop and is not obviously related to occupational exposure in the way that a head injury is related to being hit on the head. Making the casual link requires expert analysis. Mesothelioma is not the same injury as the condition of asbestosis. Mesothelioma is not a continued expression of asbestosis. It is a qualitatively different disease, distinct in its process and affecting a different part of the body. A patient's condition of asbestosis does not mean that the patient will develop or even has a reasonable probability of developing mesothelioma.

Under these occupational disease facts, the rules in *Smith* and *Sopko* are not applicable. In those cases, the causes of action accrued at or near the time of the incident which produced immediate symptoms. There was no such "incident" in this case; there was a working lifetime of intermittent and cumulative exposure to asbestos. The trial judge essentially held that Jack Duncan's diagnosis of asbestosis was the "incident" from which the statute of limitations for a mesothelioma accrued, but a diagnosis of asbestosis is not comparable with a tortious incident with immediately apparent injuries.

²⁴ *Mine Safety*, 756 P.2d at 292 n.4.

After his asbestosis diagnosis, Duncan made reasonable inquiries—unlike the plaintiffs in *Mine Safety* or *Sopko*, but like those in *Lamb*. Beginning in 1997, Duncan discussed his asbestosis concerns with his Virginia Mason doctors. But in 1997, no inquiry could have revealed within any degree of medical certainty that Duncan would be diagnosed with mesothelioma. See CP 668 at ¶ 15. No inquiry by Jack Duncan, no matter how detailed, could have produced a diagnosis of mesothelioma within the limitation period argued by respondents. Thus, it would be “profoundly unfair” to deprive Jack Duncan of his right to bring a lawsuit for mesothelioma before he has had any reasonable opportunity to do so.²⁵ Such a result would be contrary to the principle of fundamental fairness which has guided the Alaska Supreme Court in developing its discovery rule.

Alaska law compels the holding that Duncan’s cause of action accrued when he was diagnosed with the completely separate occupational injury of mesothelioma. His suit was timely-filed. Moreover, even if Duncan’s diagnosis of asbestosis was the “incident” at which time the

²⁵ See *Hanebuth*, 694 P.2d at 146; *Pedersen*, 822 P.2d at 906. Defendants appear to concede this fact, while contending they were entitled to summary judgment nonetheless. But, at the very least, Duncan raised a genuine issue of material fact on whether his current condition could have been diagnosed within two years of the date on which defendants claim his cause of action accrued. See *Smith*, 923 P.2d at 105 (holding that ordinarily summary judgment should not be granted on date that the statute of limitations starts running).

present cause of action accrued, the statute of limitations would be tolled because Duncan made reasonable but ultimately unproductive inquiry. *See Cameron*, 822 P.2d at 1367 (holding statute is tolled after accrual if plaintiff has made reasonable, but non-productive, inquiries); *Lamb II*, 129 P.3d at 926.

CONCLUSION

Permitting Duncan's lawsuit to proceed is consistent with the discovery rule in Alaska and Alaska's general policy giving litigants a reasonable opportunity to bring suit.

The trial court's decision is the "unjust or absurd result" the Alaska court warned against. *See Hanebuth*, 694 P.2d at 146. In *Hanebuth*, the Alaska court warned that

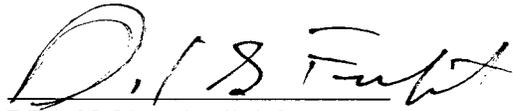
[i]f the discovery rule is not applied to wrongful death actions, a tortfeasor whose conduct has been so grievous as to cause death would be exonerated, while another tortfeasor, guilty of the same conduct except for the fortuity that it merely caused injury, would be held responsible.

Id. at 147. Preventing Mr. Duncan from bringing an action based on his terminal mesothelioma because of an old and questionable diagnosis of much less serious asbestosis ignores this specific warning.

The trial court erred when it determined that Alaska law barred Jack Duncan's suit on the ground that the limitation period elapsed before he ever knew or could have known he had mesothelioma. Alaska law

does not compel this result. Under Alaska's discovery rule, Duncan's cause of action accrued when he was diagnosed with mesothelioma. At the very least there exists a genuine issue of material fact on whether Duncan made reasonable inquiries about the presence of mesothelioma once he had notice of a possible claim. The summary judgment must be reversed.

RESPECTFULLY SUBMITTED THIS 17th day of July 2006,

A handwritten signature in black ink, appearing to read "D. S. Frockt". The signature is written in a cursive style with a horizontal line underneath the name.

BÉRGMAN & FROCKT PLLC
Matthew P. Bergman, WSBA #20894
David S. Frockt, WSBA #28568
Ari Y. Brown, WSBA #29570

LAW OFFICES OF DAVID MINER
David W. Miner
WSBA #29312
Alaska Bar # 0605008

NO. 34725-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JACK DUNCAN and JEAN DUNCAN,

Appellants,

v.

SABERHAGEN HOLDINGS, INC., ET AL.,

Respondents.

APPENDIX I

St. Petersburg Times ONLINE TAMPA BAY

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Lawyer charged with defrauding asbestos clients

He lived high on \$13.5-million in settlement money after telling clients he couldn't collect it, U.S. prosecutors say.

By ASSOCIATED PRESS
Published May 24, 2006

MIAMI - A disbarred lawyer pleaded not guilty Tuesday to federal charges that he defrauded thousands of clients out of \$13.5-million in settlement money from lawsuits claiming they were sickened by exposure to asbestos.

Louis S. Robles, 58, faces 41 counts of mail fraud contained in a grand jury indictment unsealed Tuesday. Robles, who was disbarred in 2003 after an investigation by the Florida Bar into his financial practices, surrendered to U.S. authorities on Monday.

The indictment claims Robles took money from his asbestos clients' trust fund accounts and used it to pay for personal real estate, including a 9,000-square-foot waterfront mansion on Key Biscayne, apartments in New York and Los Angeles and a condominium in Telluride, Colo.

Robles also used the settlement money to invest in movie production and a waste management firm and to pay alimony to his ex-wife, the indictment said.

"Lawyers are defenders of the law; they are not above the law," said U.S. Attorney R. Alexander Acosta of Miami in a prepared statement. "Louis Robles abused the trust of his clients, stole their money, and spent it on himself and his various business ventures."

U.S. Magistrate Judge Stephen T. Brown set Robles' bail at \$1.25-million. Because his property has now been sold and his bank and investment accounts frozen, a federal public defender, Hector Flores, was appointed to represent him.

The charges carry maximum prison sentences totaling well over 200 years, but Robles could receive between 15½ and 19½ years behind bars under federal sentencing guidelines.

Prosecutors say Robles had more than 7,000 clients in litigation against various asbestos companies, some of them bankrupted by an avalanche of personal injury lawsuits.

Many clients were workers who had been exposed for years when asbestos, which causes cancer and other health problems, was widely used.

From January 1989 until Sept. 30, 2002, Robles collected more than \$164-million from 75,000 settlements on behalf of his clients, according to court records. At least 4,500 of his 7,000 asbestos clients were victims of theft, prosecutors said.

Robles allegedly concealed his theft of asbestos settlement money by telling clients their money hadn't been received because of the companies' struggles with bankruptcy.

An unidentified widow in Louisiana received just \$420 from Robles when the lawyer had gotten more than \$61,000 on her behalf. Another widow in Florida was entitled to \$175,000 but got nothing, prosecutors said.

"Clients were calling, desperate for money," said Charles Duross, the chief prosecutor. "He wouldn't return their calls."

U.S. District Judge Alan S. Gold issued an order Monday freezing Robles' bank and investment accounts. At least partial restitution could be drawn from them if he is convicted.

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U.S. Department of Justice

R. Alexander Acosta
United States Attorney for the
Southern District of Florida

99 N.E. 4 Street
Miami, FL 33132
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May 23, 2006

NEWS RELEASE :

MIAMI ATTORNEY INDICTED FOR MISAPPROPRIATING AT LEAST \$13.5 MILLION IN CLIENT SETTLEMENT MONEY

R. Alexander Acosta, United States Attorney for the Southern District of Florida, and Jonathan I. Solomon, Special Agent in Charge, Federal Bureau of Investigation, announced today the unsealing of an Indictment charging defendant, **Louis S. Robles** with forty-one (41) counts of mail fraud in connection with his misappropriation of \$13.5 million of settlement monies from clients' trust accounts. The Indictment also contains a criminal forfeiture provision seeking a money judgment for \$13,500,000. Restraining orders have been issued by Judge Alan S. Gold to freeze two of Robles' bank accounts and two investment accounts. Robles made his initial appearance in federal court today before the U.S. Magistrate Judge Stephen T. Brown. The case has been assigned to U.S. District Court Judge Alan S. Gold.

According to the Indictment, Robles used client trust account money for his personal benefit, including financing his movie production and waste management companies, leasing apartments in New York and Los Angeles, making mortgage payments of up to \$101,000 per month on four different properties, including a 9,000 square-foot waterfront mansion in Key Biscayne, and paying his ex-wife's alimony, as well as payments to other clients.

United States Attorney R. Alexander Acosta stated, "Lawyers hold a special position of trust, responsibility, and loyalty toward their clients. Lawyers are defenders of the law; they are not above the law. Louis Robles abused the trust of his clients, stole their money, and spent it on himself and his various business ventures. This case offers a sobering reminder of the potential consequences when a lawyer breaches his duty of honesty by placing his own interests ahead of those of his clients."

FBI Special Agent in Charge Jonathan I. Solomon stated, "Louis Robles was expected to serve his clients' best interests and to be a faithful guardian of the monies entrusted to him. His actions denied thousands of victims the honest services of a trusted attorney and appropriate access to the judicial system. Robles took an oath as a member of the Florida Bar to champion his clients' cause and instead betrayed them through his criminal behavior that served only his personal interests."

According to the Indictment, Robles practiced law through various law firms ("the Robles Firms"), primarily representing thousands of workers who suffered from asbestos exposure. By May 2003, Robles had more than 7,000 asbestos clients. As the owner of the Robles Firms, Robles controlled the firm's finances, including the disbursement of settlement monies to asbestos clients from client trust accounts. Under the Rules of Professional Conduct, Robles was required to maintain client funds and property separate and apart from his own accounts.

According to the Indictment, Robles, acting contrary to his fiduciary duty and duty of loyalty as an attorney,

misappropriated trust monies belonging to his asbestos clients and used this money for his own personal and business purposes. Specifically, in April 1994, Louis Robles stopped the automatic disbursement to his clients of settlement funds he had received on their behalf, and directed that no disbursements be made without his prior authorization. At around the same time, Robles began requesting bulk withdrawals of funds from client trust accounts without his clients' knowledge or consent. According to court records, over time, the gap between settlements moneys received versus settlements paid grew until by September 30, 2002, the gap exceeded \$13,522,000.

According to the Indictment, Robles further defrauded his clients by making materially false statements regarding his receipt of settlement funds from asbestos corporate defendants. Between April 1994 and February 19, 2003, Robles caused mailings to be sent to his asbestos clients falsely stating that the payment of their claims would be delayed due to the bankruptcies of certain asbestos corporate defendants. In fact, Robles had already received settlement checks for many of his asbestos clients from several of those same asbestos corporate defendants before their bankruptcies.

In short, according to the Indictment, Robles concealed from his clients that he had received or deposited settlement funds on their behalf, caused his clients to be falsely informed that settlement funds had not been received when, in fact, he had received them, and lastly, concealed from his clients that their settlement funds had been used for purposes unrelated to their own cases.

As the result of numerous complaints, The Florida Bar initiated proceedings against Robles. Facing that investigation and a \$13.5 million deficit in the Asbestos Trust Accounts, Robles ordered a review of the Robles Firms' financial records to find "costs" that he could allege were legitimately incurred, but inadvertently uncharged, to cover the \$13.5 million shortfall. Thereafter, Robles directed that a fraudulent one-time retroactive back charge of \$12.1 million in costs be charged to his asbestos clients to conceal his misappropriation of funds from the Asbestos Trust Accounts.

Mr. Acosta commended the investigative efforts of the Federal Bureau of Investigation. This case is being prosecuted by Assistant United States Attorney Charles E. Duross.

A copy of this press release may be found on the website of the United States Attorney's Office for the Southern District of Florida at www.usdoj.gov/usao/fls <<http://www.usdoj.gov/usao/fls/>>. Related court documents and information may be found on the website of the District Court for the Southern District of Florida at www.flsd.uscourts.gov <<http://www.flsd.uscourts.gov/>> or on <<http://pacer.flsd.uscourts.gov>> <<http://pacer.flsd.uscourts.gov/>>.

[FBI Home Page](#)

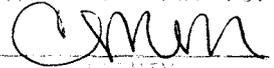
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STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

JACK DUNCAN and JEAN DUNCAN,

Appellants,

v.

SABERHAGEN HOLDINGS, et. al.,

Respondents.

No: 34725-3-II

**DECLARATION OF
SERVICE**

I, Emily Murray, declare and state as follows:

1. I am at all times herein was a citizen of the United States, a resident of King County, Washington, and am over the age of 18 years.
2. On the 17th day of July, 2006, I caused to be served true and correct copies of:
 - (1) Brief of Appellants;
 - (2) Appendix I to Brief of Appellants; and
 - (3) Declaration of Service, on the following:

Via ABC Legal Messenger:

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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 17th day of July, 2006.

BERGMAN & FROCKT



Emily Murray